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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control	)	CS Docket No. 00-30
	)	

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COMMENTS OF SBC COMMUNICATIONS INC.

Cynthia Mahowald
SBC Communications Inc.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 326-8800

James D. Ellis
Paul K. Mancini
Patrick J. Pascarella
SBC Communications Inc.
175 East Houston Street
San Antonio, Texas 78205
(210) 351-3400

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Introduction and Summary

At issue before the Commission is a transaction that would link the top two providers of "broadband" Internet services to residential subscribers and their most significant potential competitor. Through a Standard-Oil-like tangle of equity interests and contracts, the merger will allow three groups of companies to cement in place a trust-like structure that will control nearly 70 percent of *all* current residential users of high-speed Internet access service. The trust will also consolidate under common control the content most frequently accessed by a large majority of Internet users – content accounting for somewhere between 40 and 80 percent of all content accessed by residential users of Internet access services. This merger, in other words, will establish a sprawling conglomerate of interests in companies that will then have the incentive and the ability to leverage both content and distribution to dominate completely the markets they serve.

A broadband leviathan is nothing new. Prior to 1992, when Congress was finally forced to intervene, cable operators combined by merger, acquisition, and contract to exploit and consolidate power in two vertically interdependent markets: (1) the market for multichannel video programming distribution (MVPD), and (2) the market for video (television) content.

Cable operators declined to carry new channels that competed most directly with those in which the cable operators themselves owned equity interests and required competitors to give them a financial interest in programming as a condition of carrying it on their system. They likewise declined to make available program content to competing distributors – most notably direct broadcast satellite (DBS) – or sold it only on discriminatory terms calculated to suppress competition.[1]

The strategy was extremely successful. Unaffiliated distributors were unable to gain a competitive foothold. Cable locked up well over 90 percent of the relevant conduit market and a very large share of the content market, including 10 of the 15 most popular basic (non-premium) cable networks.[2] Cable controlled virtually all of the regional sports networks and four of the top five pay movie services.[3] Cable became firmly entrenched as "[the] Nation[']s dominant video distribution medium."[4] Cable operators acquired "undue market power."[5]

In 1992, after the Commission had repeatedly declined to address the steadily deteriorating state of competition in the industry, Congress intervened. It passed a comprehensive new Cable Act (a) to establish "reasonable limits" on the number of subscribers that affiliated cable systems could amass; (b) to impose "reasonable limits" on the number of channels on any given cable network that could be occupied by a video programmer in which the cable operator owned an interest; (c) to prohibit cable operators from "unduly or improperly"

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[1] 138 Cong. Rec. S566 (daily ed. Jan. 29, 1992); 138 Cong. Rec. S426-27 (daily ed. Jan. 27, 1992).

[2] 138 Cong. Rec. S14603 (daily ed. Sept. 22, 1992).

[3] 138 Cong. Rec. S566 (daily ed. Jan. 29, 1992).

[4] S. Rep. No. 102-92, at 3 (1991) ("*Senate Report*").

[5] *Id.*; *see also* H.R. Rep. No. 102-628, at 41 (1992).

influencing programming vendors in their dealings with unaffiliated distributors like DBS; and (d) to ensure that a cable operator does not unfairly exclude non-cable-affiliated programmers from its system.[6] The Department of Justice, the Federal Trade Commission, and state attorneys general simultaneously filed a number of antitrust suits against the larger cable operators;[7] the consent decrees that emerged likewise required unbundling of transport and content.

Cable is now set to try it again, in the extremely important new market space defined by high-speed Internet access services. This merger is a critical step in that process. Competition might survive this merger if the merger stood alone, especially if various safeguards were imposed along the lines that the merging parties already say they support. But the merger does not stand alone. AOL and Time Warner are parties to a briar patch of layered contracts and equity interests, most of which have never been reviewed by the Commission. AT&T stands at the center of the brambles.

It is essential that the Commission examine the existing links and untangle them – and do so *before* it countenances the creation of any new entanglements. The Commission must carefully scrutinize both equity cross-ownerships and contractual relationships. Contractual combinations are the norm in the cable industry,[8] and – as the Commission's rules implementing

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[6] 47 U.S.C. §§ 533, 536, 548.

[7] *See United States v. Primestar Partners, L.P.*, 1994-1 Trade Cas. (CCH) ¶ 70562 (S.D.N.Y. 1994) ("*Primestar Federal Decree*"); *New York v. Primestar Partners, L.P.*, 1993-2 Trade Cas. (CCH) ¶ 70403 (S.D.N.Y. 1993) ("*Primestar New York Decree*"). The defendants in these cases included Comcast Corp., Continental Cablevision, Inc., Cox Enterprises, Inc., Newhouse Broadcasting Corp., Tele-Communications, Inc., Time Warner Inc., Viacom, Inc., and GE American Communications, Inc. (a subsidiary of General Electric). *See also* Proposed Final Judgment and Competitive Impact Statement, *United States v. Tele-Communications, Inc.*, 59 Fed. Reg. 24723, 24727 (May 12, 1994) ("*Competitive Impact Statement*"); Decision and Order, *Time Warner Inc., a Corporation; Turner Broadcasting System, Inc., a Corporation; Tele-Communications, Inc., a Corporation; and Liberty Media Corporation, a Corporation*, Docket No. C-3709 (FTC Feb. 3, 1997) ("*Time Warner/Turner Consent Decree*").

[8] For example, CNN, Discovery, E!, the Learning Channel, and various other cable content properties were not owned by a single carrier, but by a group of cable operators. *See* First Report, *Implementation of Section 19 of*

the 1992 Act recognize[9] and as the antitrust laws emphasize[10] – contractual combinations can undercut competition quite as effectively as mergers.

Should the Commission fail to untangle the trust – should it instead breezily clear the way for a huge further increase in the scope of the cable conglomeration – the stage will be set for the rapid closing of competition in the market for high-speed Internet access services to residential consumers and in the market for broadband portal and content services. Lost too will be a unique opportunity to open up an older market that still remains far from competitive – the market for multichannel video programming distribution.

At stake here is the entire trajectory of broadband transport, distribution, and content markets that will define telecommunications services for residential consumers in the United States for decades to come.

I. The Transaction and the Markets.

This merger is part of an attempt to create a dominant provider of residential broadband Internet services. Three complementary markets are at stake: (1) residential broadband Internet

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the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd 7442, App. G (1994); Second Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, App. H (1995).

[9] *See* Second Report and Order, *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 8565 (1993) ("*Second Report and Order*"); Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Review of the Commission's Cable Attribution Rules*, 13 FCC Rcd 12990 (1998); 47 U.S.C. § 533(f)(2)(A). In fact, the FCC has recently stated that its 30-percent subscriber cap would apply to joint ventures and cable companies acting in concert. *See* Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, 13 FCC Rcd 14462, ¶ 43 n.104 (1998) ("*Reconsideration Order*").

[10] The antitrust laws have long recognized the dangers of such contracts and the ability of firms to engage in anticompetitive conduct without formally merging. In 1890, Congress passed section 1 of the Sherman Act, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1); the linchpin of section 1 is collective action – whether by contract, combination, trust, or any other concerted means – not merger. Indeed, the danger posed by contract is often far greater than that posed by a merger – so much so that courts have concluded that certain forms of concerted

access services; (2) broadband portal and content services; and (3) multichannel video programming distribution.

The merger threatens to cement in place a cable consortium with power over the high-speed Internet gateway to well over two-thirds of all residential users of high-speed Internet access service. The consortium will also control the most popular content on the Internet – content that attracts a combined audience conservatively estimated at 47 million unique visitors each month. This power in the access and content market will, in turn, give this cable consortium the ability to control (and limit) the evolution of competition in the MVPD market.

Begin with the access market. Time Warner and its closest affiliates currently serve 32 percent of all high-speed residential Internet subscribers. AT&T and its closest affiliates currently serve 37 percent of the market. The remaining customers are splintered among numerous independent providers of DSL and wireless services. Thus, 69 percent of the high-speed residential Internet access market is controlled by the intertwined consortia that Time Warner and AT&T control.

The Time Warner consortium likewise controls a dedicated broadband portal that serves 32 percent of residential broadband subscribers. The AT&T consortium controls a second such portal, one that serves a corresponding 37 percent share of the broadband residential market. The remaining 31 percent of the residential broadband portal market is split among a large number of other broadband portal providers, AOL among them.

Above the portals stand the Internet content markets. In any given month, nearly 77 percent of all Internet subscribers visit an AOL site and spend approximately 38 percent of all

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action, such as price fixing, are *per se* illegal and there is no need to balance any potentially pro-competitive effects. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

Internet time on AOL sites. The combined Internet content properties of AOL and Time Warner have an audience of more than 47 million unique visitors every month, nearly 18 percent more than the number two provider.[11]

Finally, the Time Warner and AT&T consortia control at least equally dominant shares of the traditional, cable-content market. Time Warner and its content affiliates make up the largest traditional media company in the world.[12] The Time Warner consortium owns four of the top 15 video programming services (CNN #14; TNT #3; TBS #2; Cartoon Network #5)[13] and the largest premium TV network (HBO).[14] Time Warner also operates a broadcast network (WB)[15] and one of the largest movie and television studios (Warner Brothers).[16] AT&T and its content affiliates comprise one of the top eight media companies in the world[17] and have ownership interests in four of the top 15 video programming services (USA Network #1, Discovery Channel #10, the Learning Channel #11 and the Sci-Fi Channel #13).[18] Together, then, the Time Warner and AT&T consortia own eight of the top 15 conventional video programming services, including four of the top five.

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[11] *AOL, Time Warner Merger – Road to Convergence*, Bus. Wire, Jan. 10, 2000.

[12] J. Schoen, *Time Warner Posts Strong Profits Driven By Cable TV, Publishing*, MSNBC (visited Apr. 12, 2000) <http://www.msnbc.com/news/393522.asp>. *See also* Time Warner, *Time Warner 1999 Fact Book* (visited Apr. 20, 2000) <http://www.timewarner.com/corp/about/pubarchive/factbook/1999fb.pdf> (*e.g.*, CNN.com).

[13] Sixth Annual Report, *Annual Assessment of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, FCC 99-418, App. D (rel. Jan. 14, 2000) ("Sixth Annual Video Report").

[14] *AOL Time Warner: World's First Internet-Age Media and Communications Company*, Bus. Wire, Jan. 10, 2000.

[15] David Lieberman, *Inside the AOL Media Giant*, USA Today, Jan. 11, 2000, at 1A.

[16] *Media Owner's Index, Time Warner*, Columbia Journalism Rev. (visited Apr. 20, 2000) <http://www.cjr.org/owners/time-warner.asp>.

[17] Robert W. McChesney, *The New Global Media*, The Nation, Nov. 29, 1999 <http://www.thenation.com/issue/991129/1129mcchesney.shtml>.

[18] Sixth Annual Video Report App. D.

Collectively, AOL, Time Warner, and AT&T will be able to leverage their dominant position in the Internet access market to increase their power in the market for broadband portal and content services. They will likewise be able to leverage their combined dominance in the broadband portal and content markets to increase their market power in the residential market for high-speed Internet access. By aggressively leveraging in both directions, they will transform cable into the dominant broadband medium. And to the extent cable emerges as the dominant medium, the market power of these intertwined consortia will grow stronger still. Together, these two consortia pass 83 million U.S. homes – 80 percent of all U.S. households.

The merger's threatened harms in all three markets center in large part, then, on the links between AOL/Time Warner and AT&T/MediaOne.[19] AT&T already owns nine percent of Time Warner Inc.,[20] and through MediaOne it intends to acquire approximately 26 percent of Time Warner Entertainment,[21] with the option to purchase 6.3 percent more.[22] By its own account, AT&T would become "the largest single stake holder in the new AOL-Time Warner."[23]

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[19] *See* Motion to Consolidate of Consumers Union, Consumer Federation of America, and Center for Media Education at 3, CS Docket Nos. 99-251 & 00-30 (FCC filed Apr. 11, 2000). SBC supports the Motion to Consolidate.

[20] AT&T's wholly-owned subsidiary, Liberty Media, owns a 9 percent interest in Time Warner. Liberty Media, *Liberty FAQ: Investor Relations – Liberty Affiliate List* (visited Apr. 19, 2000) <http://www.libertymedia.com/investor_relations/03-index.html>.

[21] Time Warner Inc. owns 74.49 percent of Time Warner Entertainment (accounting for half of Time Warner Inc. sales), which in turn owns "substantially all" of the assets of HBO, Warner Bros., Time Warner Cable Networks (with a subscriber base of approximately 13 million), as well as many other film/entertainment companies. Time Warner Inc. also owns 100 percent of Turner Broadcasting System, Inc., which owns over a dozen cable networks, including 3 of the top 5 in ratings. Finally, Time Warner Inc. owns 100 percent of such enterprises as Time Inc. (publishing) and Time Warner Telecom. Time Warner Inc., *Time Warner Inc.* (updated Sept. 30, 1999) <http://www.timewarner.com/corp/about/timewarnerinc/corporate/>; Time Warner Inc., *Time Warner Factbook*, 1999.

[22] *See* Time Warner Inc., 1998 Form 10-K (SEC filed Mar. 26, 1999).

[23] Interview by Mark Haines and David Faber with C. Michael Armstrong, AT&T CEO, *Squawk Box* (CNBC broadcast Feb. 10, 2000).

AT&T and Time Warner have already begun to coordinate their efforts. The companies recently sealed an exclusive joint-marketing deal in Syracuse and Albany under which AT&T will provide phone service over Time Warner's cable network, and customers that sign up will get free or discounted pay-per-view movies and cut-rate calling plans.[24] Another deal under negotiation would give AT&T exclusive rights to provide cable telephony to residential and small business customers over all of Time Warner's networks for *twenty* years – an extraordinarily long period in any industry, but a *de facto* merger of certain operations in an industry like this one, in which the key components of network infrastructure will have to be built out long before the contract term expires.[25]

The merger's anticompetitive impacts will be compounded further by contractual links that unite both Time Warner, through Road Runner, and AT&T, through Excite@Home, to two *additional* groups of cable operators.[26] Road Runner has exclusive contracts with MediaOne and other cable operators that pass more than 9 million additional homes.[27] Upon completion of its

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[24] *See* Jeffry Bartash, *AT&T, Time Warner in TV-Phone Link*, CBS MarketWatch, Mar. 8, 2000 <http//www.cbsmarketwatch.com/archive/20000308/news/current/telecom.htx>.

[25] The proposed deal also calls for the two companies "to jointly market communications services and to develop other broadband communications services, such as video telephony." Time Warner Press Release, *AT&T and Time Warner Form Strategic Relationship to Offer Cable Telephony*, Feb. 1, 1999, *available at* <http://cgi.timewarner.com/cgi-bin/corp/news/index.cgi?template=article&article_id=224>; *AT&T, Time Warner Set Phone-Cable-TV Service*, TechWeb, Feb. 1, 1999 <http://www.techweb.com/wire/story/reuters/REU19990201S0001>.

[26] The Road Runner partners were originally Time Warner, MediaOne and Advance/Newhouse. They were joined by Microsoft and Compaq. Road Runner Press Release, *Microsoft and Compaq Join Time Warner Cable and MediaOne in High-Speed Online Venture*, June 15, 1998, *available at* <http://www.rr.com/rdrun/>. Excite@Home began as @Home, a joint venture between TCI, Cox, and Comcast.

[27] Road Runner, *Company Profile* (visited Apr. 20, 2000) <http://rrcorp.central.rr.com/company/main_profile.html>; Road Runner Press Release, *Road Runner Goes International*, Nov. 25, 1997, *available at* <http://www.rr.com/rdrun/>; Donalee Moulton, *Newfoundland's Little Cable Firm That Could*, Nat'l Post, Sept. 13, 1999, at E07; Supplemental Information at 8, *Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control*, CS Docket No. 00-30 (FCC filed Mar. 21, 2000) ("Supplemental Filing").

MediaOne merger, AT&T will acquire a 50 percent management interest in Road Runner;[28] Time Warner holds a 40 percent voting interest.[29] For its part, Excite@Home's deals with AT&T and other cable operators[30] give it the exclusive right to serve nearly half (53 million) of all U.S. homes.[31] Moreover, Excite@Home and its principal cable partners recently extended their distribution agreements. AT&T will feature the Excite@Home portal on its cable Internet service until 2008; Comcast and Cox will have Excite@Home as the featured portal until 2006. The new agreement also increases AT&T's voting interest from 56 percent to 74 percent.[32] And AT&T remains the largest shareholder of Excite@Home, with a 25 percent ownership interest.

Small wonder, then, that AT&T has already emerged as one of the principal cheerleaders for the AOL/Time Warner deal. AT&T backs the deal not because it will promote competition in the markets AT&T aspires to dominate, but because it will reduce it.[33]

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[28] Paul Farhi, *AT&T Poised to Regain Long Reach, Via Cable*, Wash. Post, May 6, 1999, at A1.

[29] *See* Supplemental Filing at 9; Applications and Public Interest Statement, at 18 n.19, *Applications for Consent to the Transfer of Control of Licenses, Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc., Transferee* (FCC filed Feb. 11, 2000) ("Application").

[30] These operators include Century, Charter, Comcast, Cox, Garden State, Insight, Jones, and Midcontinent, among others. *See* At Home Corp., 1999 Form 10-K (SEC filed Mar. 30, 2000).

[31] Excite@Home Press Release, *Excite@Home Reports First Quarter 2000 Financial & Operating Results*, Apr. 19, 2000, *available at* <http://www.home.net/news/pr_000419_01.html> (87 million homes under contract worldwide, including 15 million homes passed by Rhythms DSL); Excite@Home, *Excite@Home Statistics* (visited Apr. 20, 2000) <http://www.home.net/news/corp_stats.html> (19.4 million homes passed by international cable partners). *See also* A. N. Newman, Schroder & Co. Inc., Investext Rpt. No. 2939778, *At Home Corp.: Initiating Coverage*, Company Report at *7 (Sept. 7, 1999) ("With 58.5 million of these households in the U.S., ATHM's exclusive territory encompasses about 57.5% of U.S. households.").

[32] Excite@Home Press Release, *Excite@Home's Principal Cable Partners Extend Distribution Agreements, AT&T Assumes More Prominent Role*, Mar. 29, 2000, *available at* <http://www.home.net/news/pr_000329_01.html>.

[33] As AT&T's Chairman has observed, "between our alignment in cable and our alignment in terms of our investment and our interest in being on each other's infrastructure, I do anticipate that we ought to be able to work out a relationship." *Squawk Box*, *supra* note 23.

A. Residential Broadband Internet Access Service.

The provision of broadband Internet access requires a last-mile conduit plus electronics, together with computers that store (cache) and provide suitable software interfaces to different forms of content.[34] The Commission's staff has previously concluded[35] – and AOL has conceded[36] – that broadband Internet access is separate from narrowband or other modes of access. The Commission's findings likewise support the conclusion that residential broadband[37] occupies a market separate from business broadband.[38]

Time Warner's cable network serves approximately 13 million subscribers and passes nearly 21 million homes.[39] Eighty-five percent of its network already supports broadband

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[34] *See* Deborah A. Lathen, Cable Services Bureau, FCC, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission* at 23-24 (Oct. 1999) (footnotes omitted).

[35] Kevin Werbach, Office of Plans and Policy, FCC, *Digital Tornado: The Internet and Telecommunications Policy* at 73-75, OPP Working Paper No. 29 (Mar. 1997) ("*Digital Tornado*").

[36] AOL has acknowledged that "there is no substitutable service that can be used to provide the same functionality and speed," and high-speed services therefore "comprise a distinct input product market." Comments of America Online, Inc. at 50, *Joint Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries*, CS Docket No. 98-178 (FCC filed Oct. 29, 1998) ("AOL Comments"); Declaration of Professor Jerry A. Hausman ¶¶ 4-10, 15, AOL Comments App. A (comparing prices for low- and high-speed services in markets where both are offered and concluding that "the price of narrowband Internet service does not affect the demand for broadband Internet service").

[37] The Commission "define[s] 'the consumer market' as consisting of small business and residential customers, to whom we sometimes refer collectively as 'the residential consumer.'" Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, ¶ 28 (1999) ("*Advanced Services Report*").

[38] *Id.* ¶¶ 26-28. The Commission has previously distinguished between business and residential product markets in its merger analysis. *See, e.g.*, Memorandum Opinion and Order, *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, ¶¶ 67-68 (1999) ("*SBC/Ameritech*"); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160, ¶ 45 (1999) ("*AT&T/TCI*"). The Commission also assumed in *AT&T/TCI* that, if broadband and narrowband markets were to be treated separately, they would further be divisible based on whether they served residential and small business customers. *Id.* ¶ 92.

[39] Supplemental Filing at 8.

Internet access, and the remainder will by 2000.[40] Time Warner provides Internet access service to its cable subscribers through an exclusive contract with Road Runner, the nation's second largest provider of residential broadband Internet access.[41]

AT&T and Time Warner will share control over Road Runner, and AT&T will also be a huge shareholder in Time Warner itself.[42] With the acquisition of MediaOne, AT&T will reach 27.5 million cable homes and more than 16 million subscribers.[43] AT&T also owns and controls Excite@Home.[44] Thus, viewing the cable world from AT&T's perspective, AT&T will have major interests in and effective control over high-speed Internet access provided to both the Road Runner cable affiliates and the Excite@Home cable affiliates – which together represent a staggering 83 million homes, reaching 80 percent of U.S. households.[45] It will control (or at the

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[40] Time Warner Inc., *Time Warner Cable, Overview* (visited Apr. 19, 2000) <http://www.timewarner.com/corp/about/cablesys/twcable/about.html>.

[41] Road Runner had approximately 550,000 subscribers at year end 1999, which is roughly 32 percent of the total broadband market of 1.7 million subscribers. *See infra* note 46. Of these subscribers, an estimated 330,000 were Time Warner customers. Time Warner Entertainment Co. L.P., 1999 Form 10-K405 (SEC filed Mar. 30, 2000). *See* x.DSL.com, *Deployment and Projections* (updated Feb. 15, 2000) <http://www.xdsl.com/content/resources/deployment_info.asp> (estimating approximately 338,000 residential DSL subscribers); Cable Datacom News, *Cable Modem Market Stats & Projections* (updated Mar. 3, 2000) <http://cabledatacomnews.com/cmic/cmic16.html> (estimating 1.3 million U.S. cable modem subscribers) ("*Cable Modem Market Stats & Projections*"); Interview by Mary K. Flynn and Steve Young with Dylan Brooks, Jupiter Communications analyst, *CNNfn Digital Jam* (CNNfn broadcast Apr. 7, 2000) (estimating 60,000 households served by DirecPC).

[42] Farhi, *supra* note 28.

[43] *Ex Parte* Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Magalie Roman Salas, Secretary, FCC, at Table C, *Applications for Transfer of Control to AT&T Corp. of Licenses and Authorizations Held by MediaOne Group, Inc.*, CS Docket No. 99-251 (FCC filed Apr. 7, 2000); Applications and Public Interest Statement at App. B, *Applications for Consent to the Transfer of Control of Licenses, MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251 (FCC filed July 7, 1999) ("AT&T/MediaOne Application").

[44] Excite@Home has approximately 644,000 subscribers. *See Cable Modem Market Stats & Projections*.

[45] Road Runner partners and affiliates pass approximately 30 million homes. Road Runner, *Company Profile* (visited Apr. 20, 2000) <http://rrcorp.central.rr.com/company/main_profile.html> (approximately 30 million homes worldwide). Excite@Home affiliates pass through 52.6 million homes. Excite@Home Press Release, *Excite@Home Reports First Quarter 2000 Financial & Operating Results, supra* note 31 (87 million homes under contract worldwide, including 15 million homes passed by Rhythms DSL); Excite@Home, *Excite@Home Statistics* (visited Apr. 20, 2000) <http://www.home.net/news/corp_stats.html> (19.4 million homes passed by international

very least strongly influence) the cable gateway to approximately 90 percent of residential customers that currently use *cable* for their high-speed Internet access service – and 69 percent of *all* current residential users of high-speed Internet access service.[46]

For its part, AOL is poised to become one of the largest (and likely *the largest*) providers of broadband Internet access. AOL provides service to more than 20 million subscribers – about 40 percent of all Internet subscribers – making it the largest ISP by a very wide margin.[47] As the Applicants themselves predict, AOL will migrate many of its narrowband subscribers to broadband[48] within the two-year period of entry by which mergers are judged.[49]

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cable partners). The total number of U.S. homes was calculated based on the U.S. Dep't of Commerce, *Statistical Abstract of the United States* at Table 70 (1999) (U.S. households in 1998).

[46] This is based on the subscriber numbers described, *supra*, in notes 41 and 44, and the approximately 1.7 million cable modem users at the end of 1999. *See Cable Modem Market Stats & Projections*; Road Runner Press Release, *Road Runner Triples Customers in 1999*, Jan. 12, 2000, *available at* <http://www.rr.com/rdrun/>. There were approximately 338,000 residential DSL customers in the U.S. xDSL.com, *Deployment and Projections* (updated Feb. 15, 2000) <http://www.xdsl.com/content/resources/deployment_info.asp>. DirecPC deployment estimates range from 30,000 to 110,000, but these estimates sometimes include business and international customers. *See, e.g.*, Theresa Foley, *Multimedia Monitor: Ready or Not, Satellite Internet Is on Its Way*, Via Satellite, Apr. 10, 2000 ("DirecPC has more than 100,000 satellite-Internet users since introduction in 1997, but only about 30,000 of them are believed to be residential users."); *DirecTV's Hartenstein Assails Echostar Suit*, Satellite Week, Feb. 14, 2000 ("Hughes Network Systems launched DirecPC satellite service aimed at consumers in 1997, but has attracted only 110,000 subscribers to largely business-oriented system."); Interview by Neil Cavuto with Michael Smith, Chairman & CEO, Hughes Electronics, Cavuto Bus. Rep. (Fox News broadcast, Jan. 14, 2000) ("Michael Smith: 'DirecPC was a product we brought out for business to business use . . . . Most of those subscribers are businesses. We haven't put any marketing dollars behind DirecPC as a consumer product.'"). SBC's analysis is based on the conservative estimate of 60,000 residential DirecPC subscribers in the U.S. *Digital Jam*, *supra* note 41 (estimate by Jupiter Communications analyst Dylan Brooks).

[47] *AOL Time Warner: World's First Internet-Age Media and Communications Company*, Bus. Wire, Jan. 10, 2000. AOL added five million members in 1999 – more than Microsoft's MSN and AT&T's WorldNet online services combined have signed up in the last five years. Marc Gunther, *These Guys Want It All*, Fortune, Feb. 7, 2000, at 70.

[48] Supplemental Filing at 17-20. "Even before its merger with Time Warner was announced," AOL was "actively pursuing" entry into the broadband market. *Id.* at 16. And AOL's customers are highly likely to shift given their usage patterns. They average nearly an hour a day online, which is more than twice as much as the average online household. Sanford C. Bernstein & Co., McKinsey & Co., *Broadband*! 24 (Jan. 2000).

[49] The Commission has recognized that an incumbent is constrained by market entry that is likely to occur within two years. Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, ¶ 105 (1998) ("*MCI/WorldCom*"). *See also* United States Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* § 3.2 (rev. Apr. 8, 1997).

B. Broadband Internet Portal and Content Services.

Broadband content includes such things as streaming video and audio, video e-mail, interactive advertising, video conferencing, and traditional (enhanced) video programming – none of which can be delivered effectively over low-speed lines.[50] Broadband services are typically distributed through a broadband portal, which provides a user-friendly interface to higher tiers of content. All of the leading broadband Internet access providers have established broadband portals for this purpose.

The Applicants already control access to the most sought-after content on the Internet. As noted, their content properties have a total combined audience of more than 47 million unique visitors every month, nearly 18 percent more than the number two provider, Yahoo.[51] And, in any given month, nearly 77 percent of all Internet subscribers will visit an AOL site.[52] In January 2000, visitors spent 21.6 billion minutes on AOL's sites – 38 percent of all Internet

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[50] Andrew W. Davis, *Cable Modems: A High-Bandwidth Solution to Internet Access*, Networked Multimedia for Bus., Jan./Feb. 1998. Broadband content is a separate market from broadband access. *See Advanced Services Report* ¶ 23.

[51] *AOL, Time Warner Merger – Road to Convergence*, Bus. Wire, Jan. 10, 2000.

[52] *See* Media Metrix Press Release, *Media Metrix Releases the Top 50 Web & Digital Media Properties in the U.S., & Top Newcomers Among the Top 21,000*, Mar. 21, 2000, *available at* <http://www.mediametrix.com/PressRoom/Press_Releases/03_21_00.html> (57.7 million unique users of the 74.6 million unique users of digital media visited AOL sites in February 2000). The average over the past six months is 78 percent of all Internet users. *See* Media Metrix Press Release, *Media Metrix Releases the Top 50 At-Home and At-Work Digital Media and Web Audience Ratings in the U.S. for January 2000*, Feb. 22, 2000, *available at* <http://www.mediametrix.com/PressRoom/Press_Releases/02_22_00a.html>; Media Metrix Press Release, *Media Metrix Releases the Top 50 At-Home and At-Work Digital Media and Web Audience Ratings in the U.S. for December 1999*, Jan. 20, 2000, *available at* <http://www.mediametrix.com/PressRoom/Press_Releases/01_20_00.html>; Media Metrix Press Release, *Media Metrix Releases the Top 50 At Home and At Work Digital Media and Web Audience Ratings in the U.S. for November 1999*, Dec. 21, 1999, *available at* <http://www.mediametrix.com/PressRoom/Press_Releases/12_21_99b.html>; Media Metrix Press Release, *Media Metrix Releases the Top 50 At Home and At Work Digital Media and Web Audience Ratings in the U.S. for October 1999*, Nov. 22, 1999, *available at* <http://www.mediametrix.com/PressRoom/Press_Releases/11_22_99.html>; Media Metrix Press Release, *Media Metrix Releases the Top 50 At Home and At Work Digital Media and Web Audience Ratings in the U.S. for September 1999*, Oct. 20, 1999, *available at* <http://www.mediametrix.com/PressRoom/Press_Releases/10_20_99.html>.

time.[53] AOL is also the dominant provider of Internet messaging services,[54] one of the largest and fastest-growing Internet applications.[55]

Although much of AOL's content is narrowband, AOL is quickly emerging as a leading provider of broadband content. On April 10, 2000, the company rolled out AOL Plus, which includes broadband versions of AOL's video, audio, games, and online catalogue shopping.[56] A broadband version of AOL Instant Messenger will also soon emerge.[57]

Time Warner's vast array of video, publishing, and movie properties are also ideally suited for distribution via broadband Internet service. Time Warner operates its own broadcast network (WB) and one of the largest movie studios (Warner Brothers).[58] It owns four of the top 15 video programming services[59] and the largest premium television network.[60] Its publishing business includes 120 million magazine readers.[61] Its music business just announced a merger

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[53] Patricia Jacobus, *AOL, Tax Sites Make Headway in Traffic*, CNET News.com, Feb. 22, 2000 <http://home.cnet.com/category/0-1005-200-1554872.html>.

[54] *See* AOL Press Release, *America Online Introduces Next-Generation AOL Instant Messenger, Version 3.0, for Windows and Mac Users*, Aug. 24, 1999, *available at* <http://media.web.aol.com/media/press.cfm?>.

[55] *AWZ Reconciles Warring IMs of Microsoft and AOL; Website Unveils Instant Messaging That Connects AIM and MSMNS*, PR Newswire, Apr. 5, 2000; AOL Corporate, *Who We Are* (visited Apr. 25, 2000) <http://corp.aol.com/who_icq.html>.

[56] AOL Press Release, *AOL 5.0 Launches Worldwide*, Oct. 5, 1999, *available at* <http://media.web.aol.com/media/press.cfm?>.

[57] Software vendors have recently developed broadband applications for instant messaging to support full, instantaneous video and voice communication as well as text. *See, e.g., Ericsson and White Pine Team to Create First Commercially Available Instant Messaging with Video*, Cambridge Telecom Rep., Apr. 3, 2000.

[58] David Lieberman, *Inside the AOL Media Giant*, USA Today, Jan. 11, 2000, at 1A; *Media Owner's Index, Time Warner*, Columbia Journalism Rev. (visited Apr. 20, 2000) <http://www.cjr.org/owners/time-warner.asp>.

[59] Sixth Annual Video Report, App. D.

[60] *AOL Time Warner: World's First Internet-Age Media and Communications Company*, Bus. Wire, Jan. 10, 2000.

[61] *Id.*

with EMI, which will make it the largest in the world.[62] Road Runner provides its own broadband portal, and has entered into numerous deals to secure exclusive access to broadband content provided by others.[63]

The AT&T entanglements make the content consortium larger still. AT&T owns Liberty Media,[64] which holds interests in a broad range of video programming (including four of the top 15 video programming services), communications, technology, and Internet businesses.[65] Excite@Home, controls Excite, a leading Internet portal[66] and the sixth most heavily trafficked site on the Internet.[67] And Excite@Home has created a proprietary broadband portal with its own line-up of broadband content, offered exclusively to customers of its cable-based Internet access service.[68]

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[62] Peter T. Larsen, *et al.*, *Warner-EMI Plan Greeted Coldly*, Fin. Times, Feb. 12, 2000 <http://www.ft.com/nbearchive/email-meq32f14e.htm>.

[63] Road Runner has procured music content from Live365.com, Tunes.com, and Music Choice; film content from Turner Classic Movies and Druid Media; television programming from Nickelodeon, Rainbow Media, ChannelSEEK, the Weather Channel, and C-SPAN; gaming media from Brilliant Digital Entertainment, theglobe.com, and webstakes.com. For leisure and travel, Road Runner has inked deals with Preview Travel, Quokka Sports, and the Visual Data Corporation.

[64] *AT&T/TCI* ¶ 35.

[65] Liberty's satellite and broadcast network entities include, among others, wholly-owned subsidiary Encore Media, a 9 percent interest in Time Warner, Inc., a 49 percent interest in Court TV, a 35 percent interest in BET Holdings II, Inc., a 49 percent interest in Discovery Communications, a 21 percent interest in USA Networks, and a 44 percent interest in TV Guide, Inc. Liberty Digital, Inc. owns interests in Internet services such BET.com, MTV Online, Replay Networks, and Sportsline USA. Liberty has interests in cable and technology entities such as General Instrument and Jupiter Telecommunications. Liberty Media, *Investor Relations – Liberty Affiliate List* (visited Apr. 20, 2000) <http://www.libertymedia.com/investor_relations/03-index.html>.

[66] Excite@Home Press Release, *@Home Network and Excite Complete Merger*, May 28, 1999, *available at* <http://www.home.net/news/pr_990528_01.html>.

[67] John Markoff, *Internet Service Is Planning $6 Billion Deal to Buy Excite*, N.Y. Times, Jan. 19, 1999, at C1. Excite receives an average of 17 million hits per month. @Home Press Release, *@Home Network and Excite to Merge*, Jan. 19, 1999, *available at* <http://www.home.net/news/pr_990119_01.html>.

[68] *See, e.g.*, Cox, *COX@Home: Features* (visited Apr. 20, 2000) <http://www.cox.com>.

C. Multichannel Video Programming Distribution.

As the Commission recently recognized, Internet-delivered video is now poised to compete directly against traditional cable programming.[69] It is now technically possible to stream the Disney Channel, ESPN, A&E, and other any number of other video channels through broadband Internet portals – if the portals and Internet access services remain technically and contractually open to such uses.

AT&T, Time Warner, and the other cable members of the Excite@Home and Road Runner consortia have no incentive to promote the development of the competitive alternatives that are certain to cannibalize the revenues of their traditional cable fare. Until recently, AOL did. Once it is folded into the sprawling cable trust, it no longer will.

II. The Commission Must Apply the Same Merger Criteria to All Major Mergers That It Reviews.

As a threshold matter, the Commission must reaffirm that the *Bell Atlantic/NYNEX*[70] framework for analyzing mergers applies to the Applicants' transaction. Although SBC continues to question the doctrinal soundness of the Commission's methodology for analyzing mergers, a cardinal principle of lawful administrative process is even-handed treatment.

In all relevant respects, this merger is indistinguishable from previous mergers in which the Commission has applied *Bell Atlantic/NYNEX.* The merger involves the transfer of licenses pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended.[71] And

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[69] Sixth Annual Video Report ¶ 110.

[70] Memorandum Opinion and Order, *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, ¶ 169 (1997) ("*Bell Atlantic/NYNEX*").

[71] *See* 47 U.S.C. §§ 214(a), 310(d). The wireless licenses in *Bell Atlantic/NYNEX* were tangential to the main transaction; here, the licenses relate directly to the competitive issues raised by the merger, and are critical to the core operations of the two companies. *See, e.g., Application of Carter Mountain Transmission Corp., Cody,*

it has both horizontal and vertical implications, as did AT&T's merger with TCG,[72] MCI's proposed merger with BT,[73] and AT&T's merger with TCI.[74]

The Applicants argue that the merger should not be evaluated under *Bell Atlantic/NYNEX* because its horizontal impacts are small – "[t]here are thousands of competitors" providing Internet access service and "legions of other content providers."[75] But the market shares of the merging parties are relevant to the Commission's application of the *Bell Atlantic/NYNEX* framework – not to the threshold question of whether the framework applies at all.[76] And, in any event, airy language about "thousands" and "legions" cannot change the fact that AOL and Time Warner are dominant players in both of these markets.[77]

The Applicants pass even more quickly over the staggering vertical implications of their merger. But the merger presents a major vertical threat – which the Commission is bound (by its own precedent) to review with care.[78] The anticompetitive risks of vertical links between transport and content have likewise been of concern to Congress, the Department of Justice, and

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Wyo., For Construction Permit To Install an Additional Transmitter, 32 FCC 459 (1962); *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). *See also* First Report and Order, *Amendment of Subpart L, Part 11, To Adopt Rules and Regulations To Govern the Grant of Authorization in the Business Radio Service for Microwave Stations To Relay Television Signals to Community Antenna Systems*, 38 FCC 683 (1965).

[72] *See* Memorandum Opinion and Order, *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, for Consent to Transfer Control*, 13 FCC Rcd 15236, ¶ 18 (1998).

[73] *See* Memorandum Opinion and Order, *The Merger of MCI Communications Corporation and British Telecommunications plc*, 12 FCC Rcd 15351, ¶¶ 39-40 (1997).

[74] *See AT&T/TCI* ¶¶ 20-50.

[75] Application at 7.

[76] *Cf.* Memorandum Opinion and Order, *Applications of PacifiCorp Holdings, Inc., Transferor, and Century Telephone Enterprises, Inc., Transferee, For Consent to Transfer Control of Pacific Telecom, Inc., a Subsidiary of PacifiCorp Holdings, Inc.*, 13 FCC Rcd 8891, ¶ 13 (1997).

[77] Moreover, the Applicants propose the merger of a leading MVPD provider (Time Warner) and one of the most significant potential competitors (AOL), which is hardly "devoid of any horizontal consequences." *See* Application at 16.

[78] *See Bell Atlantic/NYNEX* ¶ 37.

the Federal Trade Commission, and have been addressed in two federal Acts (the 1992 Cable Act and the Satellite Home Viewer Improvement Act of 1999), and in several consent decrees.[79] The combined AOL/Time Warner will plainly be in a position to leverage content to control conduit, and to leverage conduit to control content.

In sum, the Commission is bound to apply the *Bell Atlantic/NYNEX* standard, as it has done in previous cases that had far more limited competitive implications, both horizontal and vertical. The Applicants bear the burden of demonstrating that their merger will be in the public interest, convenience, and necessity.[80] The Commission must "be *convinced* that it will enhance competition."[81] A merger satisfies this standard only if "the harms to competition – *i.e.*, enhancing market power, [or] slowing the decline of market power . . . are outweighed by benefits that enhance competition. If applicants cannot carry this burden, the applications must be denied."[82]

III. Vertical Effects of the Merger.

So long as they remain tightly intertwined, the AOL/Time Warner/Road Runner consortium and the AT&T/MediaOne/Excite@Home consortium will be able to leverage their combined dominance in broadband content and portal markets to increase their market power in the residential market for high-speed Internet access. The two consortia will likewise be able to leverage their market power in the other direction, using their dominant position in the Internet access market to increase their power in the market for broadband content and portal services.

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[79] *See, e.g.*, *Primestar Federal Decree*; *Competitive Impact Statement*, 59 Fed. Reg. at 24727; *Time Warner/Turner Consent Decree*.

[80] *Bell Atlantic/NYNEX* ¶ 37.

[81] *Id.* ¶ 2 (emphasis added); *see also SBC/Ameritech* ¶ 49.

[82] *Bell Atlantic/NYNEX* ¶ 2.

A. A Combined AOL/Time Warner Will Have the Incentive To Favor Cable and Will Have the Ability and Incentive To Leverage Its Dominance Over Broadband Content and Portal Services To Increase Its Market Power in Residential Broadband Internet Access Service.

Time Warner has been rapidly assembling a closed, vertically-integrated set of broadband operations, stretching from the customers' premises through the exclusive Road Runner portal and on up to Time Warner's content, and to content Time Warner obtains from others through exclusive contracts. AT&T has been doing much the same, with cable at the bottom and Excite@Home at the top. So far, this Commission has taken no action against these accreting layers of exclusivity, largely because of the promise of competition from AOL. AT&T itself sought to justify its own mergers by arguing that "[t]he Internet and online service business today is dominated by AOL."[83]

AOL was indeed a potent force. Frozen out of cable space by the cable operators' exclusive arrangements with others, AOL had to promote both open access and competitive alternatives – or wait for its 20 million subscribers to melt away as broadband came to supplant narrowband access. AOL therefore struck deals to offer broadband access to its service via DSL and DBS. And it led the campaign for "open access" to cable's pipes.[84]

The Time Warner merger and the link with the AT&T cable consortium completely alters

[83] *See, e.g.*, AT&T/MediaOne Application at 69.

[84] AOL was a member of the Open Net Coalition (an industry group advocating open access) and funded lobbying efforts across the country. Sam Loewenberg & Ron Eckstein, *Learning How to Speak in One Voice*, Legal Times, Jan. 17, 2000, at 10. *See also* David Hatch, *Broadband Tiff Heats Up*, Electronic Media, Apr. 19, 1999, at 8.

AOL's incentives.[85] AOL has abruptly ended its lobbying efforts for open access.[86] It continues to pay lip service to that objective,[87] but its "Memorandum of Understanding" with Time Warner makes clear that AOL/Time Warner will not negotiate with unaffiliated ISPs until Time Warner's contracts with Road Runner expire.[88] In an industry unfolding as fast this one, a several-year delay is as good as a permanent one, particularly in light of the powerful network effects and the leveraging possibilities discussed below. And the companies do not even suggest that they will ever give unaffiliated ISPs access on the *same terms* as they offer to affiliates, or that they might provide equal access to AOL/Time Warner *content*.[89]

AOL's incentives to offer its content over competing distribution media like DSL have all but disappeared as well. AOL now has a strong incentive generally to favor cable over DSL or satellite throughout the country;[90] the incentive will be overwhelming in all geographic

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[85] AOL CEO Steve Case could not even make it through the first press conference announcing the merger without changing his tune on open access: "For the Internet to flourish, there has to be competition at the infrastructure layer. We always hoped that it would come through the marketplace as opposed to the government having to get involved." Interview by Ron Insana and Allan Chernoff with Steve Case, AOL CEO, *Business Center* (CNBC News broadcast, Jan. 10, 2000).

[86] *AOL Ends Fight for Cable Open Access*, CNET News.com, Feb. 14, 2000 <http://news.cnet.com/news/0-1004-200-1549311.html>.

[87] Supplemental Filing at 22-23.

[88] Memorandum of Understanding Between Time Warner Inc. and America Online, Inc. Regarding Open Access Business Practices ¶ 11 (FCC filed Feb. 29, 2000) ("MOU"). Steve Case subsequently stated, however, that AOL might attempt to end Time Warner's exclusive contract with Road Runner before it expires at the end of 2001. *See AOL, AT&T in Partnership Talks*, Bloomberg News, Mar. 8, 2000. AT&T has taken the position that it would not begin negotiations with unaffiliated ISPs until its contracts with Excite@Home expire in 2002. Corey Grice, *AT&T Casts Shadow Over Excite@Home Strategy*, CNET News.com, Oct. 18, 1999 <http://news.cnet.com/news/0-1004-200-918437.html?tag=st.cn.1>.

[89] The MOU states only that the companies will negotiate "arm's-length commercial agreements with both affiliated (such as AOL) and unaffiliated ISPs," and that it "will not place any fixed limit on the number of ISPs with which it will enter into commercial arrangements." MOU ¶¶ 3, 4. AOL would not under current interpretations of law be subject to common carrier regulation.

[90] AOL's "strategy involves delivering DSL services today and AOL-Time-Warner cable and DirecPC services tomorrow." S. J. Vaughan-Nichols & D. Hakala, *Why AOL Holds All the Keys*, ZDNet, Apr. 17, 2000 <http://www.zdnet.com/zdnn/stories/news/0,4586,2550871,00.html>.

markets where AOL/Time Warner is itself the local provider of cable service.[91] AOL will inevitably follow the lead of Excite@Home and limit its marketing of AOL content over DSL to geographic markets where AOL's content is not available over cable.[92]

Practical engineering realities strongly encourage such a shift. The software, hardware, servers, and other equipment that will be optimal for cable head-ends are unlikely to be optimal – or even fully-compatible – with DSL and other distribution technologies. The twin cable consortia will have a very strong incentive to use, advance, and push down the costs of technology that works best with cable, simply because they own so much cable themselves.

The Applicants argue that AOL's sources of revenues – subscribers, advertising, and e-commerce – all depend on reaching "as many eyeballs as possible." They will not favor their own cable network, they say, because it passes only 20 percent of homes nationwide.[93]

But the combined AOL/Time Warner/Road Runner and AT&T/Excite@Home consortia reach over 80 percent of U.S. households. That is certainly a sufficient share to justify sharply exclusionary conduct in favor of cable. And, in any event, the many-eyeballs argument makes economic sense only for a pure provider of content, not for a conglomerate that has economic interests in both content and conduit. The profit-maximizing strategy for such a conglomerate will involve a complex balancing of "eyeballs" against "conduit" profits.[94]

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[91] For example, in cities like Houston and San Antonio, where Time Warner has the local cable franchise, AOL has little need or interest in pushing its services over DSL. Time Warner, *About Time Warner Cable Systems & Brands* (visited Apr. 20, 2000) <http://www.pathfinder.com/corp/about/cablesys/twcable/systems.html>.

[92] At Home Corp., Form 10-Q (SEC filed Nov. 15, 1999). Nothing in AOL's prior agreements will prevent the merged company from shifting its focus exclusively to cable. Indeed, while the Applicants tout their prior agreements as "non-exclusive," this merely frees them to desert other delivery technologies and migrate to cable. Supplemental Filing at 16.

[93] Application at 13.

[94] AOL and Time Warner have already demonstrated that they understand the power of this strategy. For example, competing ISPs have sued AOL for modifying version 5.0 of its software to imbed AOL as the default ISP

This is especially true in markets like the ones at issue here, characterized as they are by large economies of scale and by "tipping point" dynamics.[95] In such markets, it will often make sense for a dominant company to abandon temporarily a "more-eyeballs" strategy in favor of a "more-cable-subscribers" strategy, knowing that the additional eyeballs will be recaptured in the end, when cable emerges triumphant.[96] This was exactly the strategy that cable pursued vis-à-vis DBS until Congress intervened with the 1992 Cable Act. If such a strategy made sense for DBS back then, it will make sense for DSL now.

B. A Combined AOL/Time Warner Will Have the Ability and Incentive To Leverage Its Dominance Over Residential Broadband Internet Access To Increase Its Market Power in Broadband Content and Portal Services.

Acting in concert, the AT&T/MediaOne/Excite@Home and AOL/TimeWarner/Road Runner consortia will be able to exercise enormous power, perhaps monopsony power, over the markets for broadband content and software applications, including software and services for network and caching management, data interchange, IP telephony, encryption, and streaming video.[97] This type of exploitation of market power should be of particular concern in markets for

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setting. Vaughan-Nichols, *supra* note 90. AOL and Time Warner have also begun to execute exclusive content negotiations. *See, e.g.*, AOL Press Release, *AOL & Time Warner Announce Online Unveiling of the 2000 Sports Illustrated Swimsuit Issue Cover on AOL*, Feb. 17, 2000, *available at* <http://media.web.aol.com/media/press.cfm?>. Road Runner and Excite@Home have entered into similar deals over the past year with Sega, Preview Travel, Fox News, LookSmart, and others that call for "exclusive" or "primary" placement of some sort. This actual behavior belies the Applicants' assertion that they have both the intention and the economic interest to "make AOL Time Warner content easily accessible to consumers." Application at 19.

[95] A useful discussion of the competitive dynamics of network industries was written not long ago by Timothy F. Bresnahan, who is now the Department of Justice's Chief Economist: *New Modes of Competition: Implications for the Future Structure of the Computer Industry in Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace* (1998). As he explains, once established, this dominance tends to endure.

[96] The classic example of such leveraging is Microsoft's projection of the dominant position of its Windows operating system into the browser market.

[97] In fact, AOL and Time Warner have *already* begun to execute exclusive agreements whereby the companies leverage their power over broadband access to gain an advantage in the content market. Recently, the companies signed an agreement wherein CNN Interactive will become the premier broadcast news partner for AOL's Netscape Netcenter. Under the terms, CNN will be "prominently featured" on the Netcenter service, and